Filed 6/30/16 Khanna v. Sonasoft Corp. CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

VINCE KHANNA, Plaintiff and Respondent, v. SONASOFT CORPORATION, et al., Defendants and Appellants.	H040007 (Santa Clara County Super. Ct. No. 1-06-CV-074362)

Respondent Vince Khanna, a former employee of Sonasoft Corporation (Sonasoft), filed a civil action against Sonasoft and Andy Khanna (Andy),[1] Sonasoft's Chief Executive Officer (CEO) (together appellants). Sonasoft allegedly had employed respondent from about February 1, 2005 until about March 31, 2006, but had failed to properly pay his wages. The operative complaint contained alter ego allegations with respect to Sonasoft and Andy.

A judgment was entered against Sonasoft pursuant to the parties' judicially supervised confidential settlement (the settlement), which was orally placed on the record and later set forth in a written court order. (See Code Civ. Proc., § 664.6)[2] This case involves appeals from the "Amended Judgment" (first amended judgment) and the second amended judgment, not from the original judgment.

[1] Apparently, although they have the same surname, Andy and respondent are not related. We will refer to Andy by his first name since there are a number of other individuals with the last name of Khanna, including respondent.

[2] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

After entry of the original judgment, the trial court awarded postjudgment costs, attorney fees, and interest. Those postjudgment orders were incorporated into the first amended judgment entered on June 27, 2013. The trial court subsequently granted respondent's motion to add Andy as an additional judgment debtor on an alter ego theory. That order was incorporated into the second amended judgment entered on September 24, 2013.

Sonasoft challenges the postjudgment awards of attorney fees, costs, and interest that followed its motion to tax costs. Andy challenges the amendment adding him as judgment debtor on an alter ego theory.

With respect to the postjudgment awards of costs, attorney fees, and interest, we find that Sonasoft's contentions were forfeited in part and otherwise Sonasoft has not established any reversible error. We conclude that the trial court abused its discretion in adding Andy as a judgment debtor following the settlement, which provided for respondent to dismiss Andy from the lawsuit with prejudice and each party to bear his own attorney fees and costs. Accordingly, we will modify the second amended judgment to omit the provision adding Andy as a judgment debtor and affirm that judgment as modified.

I

Procedural History

The original complaint alleged nine causes of action, all related to Sonasoft's failure to properly pay wages to respondent: "Nonpayment of Wages" (first cause of action); "Waiting Time Penalties under Labor Code Section 203" (second cause of action); "Violation of Labor Code Section 204 - Semimonthly Payments" (third cause of action); "Violation of Labor Code Section 212 - Prohibited Forms of Payment" (fourth cause of action); tortious discharge in violation of public policy (employment allegedly terminated "to avoid payment of wages due") (fifth cause of action); breach of covenant of good faith and fair dealing (respondent discharged to avoid "full, prompt,

and in proper form, payment" of his wages) (sixth cause of action); injunction and treble damages of Business and Professions Code section 17200 (appellants failed to pay full and prompt wages for the purpose of injuring respondent and appellants' competitors) (seventh cause of action); fraud (false representation that respondent would be retroactively paid induced his continued employment) (eighth cause of action); accounting (ninth cause of action); declaratory relief (tenth cause of action).

The trial court (Levinger, J.) granted summary judgment on the original complaint in favor of Andy because it was undisputed that Sonasoft, not Andy, employed respondent. It also granted summary adjudication as to the ninth cause of action for fraud in favor of Sonasoft. It stated: "The undisputed facts establish that the employment agreement, signed by [respondent], provide[d] that it 'is understood that the Company is not currently able to pay the full amount of such salary, therefore the amount not paid shall accrue.' "

On March 23, 2009, respondent filed a first amended complaint. It alleged that Sonasoft was a closely held corporation and that Andy was a founder, a director, and the CEO of Sonasoft. A copy of an employment agreement between Sonasoft and respondent, signed by Andy and respondent and dated February 1, 2005, was attached to the complaint and incorporated by reference.

That employment agreement provided that Sonasoft would pay respondent a monthly salary of $10,000. It stated that it was "understood that the Company is not currently able to pay the full amount of such salary, therefore the amount not paid shall accrue (the 'Accrued Salary') to be paid on the terms and conditions set forth in the remainder of this agreement." The agreement provided several options for the payment of accrued unpaid salary to which respondent was entitled, including payment "in common stock of the Company at the then fair market value of such common stock."

The first amended complaint additionally alleged that Andy owned approximately 1,700,000 shares of Sonasoft's stock. It contained alter ego allegations as to Sonasoft

and Andy. It asserted that there was "a unity of interest and ownership between Defendants Andy Khanna and Sonasoft Corp. such that any individuality and separateness has ceased to exist" and that Sonasoft was "a mere shell, instrumentality, and conduit through which Defendant Andy Khanna carried on his business . . . ."[3]

The first amended complaint alleged that appellants owed respondent approximately $28,380 in unpaid wages and a $15,000 bonus when his employment was terminated on or about March 31, 2006. It further alleged that appellants also failed to pay $960 for "vacation time" when he was terminated, but they mailed "a check for vacation pay" to him on or about May 4, 2006. Appellants also allegedly mailed a certificate for 95,000 shares of Sonasoft stock to respondent in the same May 2006 correspondence. The first amended complaint alleged that there was "no ready market for Sonasoft stock."

The first amended complaint alleged 14 causes of action against appellants, all related to Sonasoft's failure to promptly and fully pay wages to respondent: "Nonpayment of Wages" (Labor Code, §§ 201, 227.3, 218.5, 218.6)[4] (first cause of

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[3] The first amended complaint further alleged: "[Andy] exercise[ed] complete control and dominance of such business to such extent that any individuality or separateness of [Andy] and [Sonasoft] does not, and at all times herein mentioned did not, exist. The activities and business of Sonasoft were carried out without the holding of directors' or shareholders' meetings, no records or minutes of corporate proceedings were maintained, and [Andy] entered into personal transactions with Sonasoft without the approval o[f] other directors or shareholders. Adherence to the fiction of the separate existence of [Sonasoft] as an entity distinct from [Andy] would permit abuse of the corporate privilege and would sanction a fraud and promote injustice."

[4] "If an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately." (Lab. Code, § 201, subd. (a).) "Unless otherwise provided by a collective-bargaining agreement, whenever a contract of employment or employer policy provides for paid vacations, and an employee is terminated without having taken off his vested vacation time, all vested vacation shall be paid to him as wages at his final rate . . . ." (Lab. Code, § 227.3.) Labor Code section 218.5 provides for an award of reasonable attorney fees and costs to the prevailing party in an action brought for the nonpayment of wages. Labor Code section 218.6 provides

action); "Waiting Time Penalties under Labor Code Section 203"[5] (second cause of action); "Violation of Labor Code Section 204 - Semimonthly Payments"[6] (third cause of action); "Violation of Labor Code Section 212 - Prohibited Forms of Payment"[7] (fourth cause of action); tortious discharge in violation of public policy (employment allegedly terminated "to avoid payment of wages due") (fifth cause of action); breach of covenant of good faith and fair dealing (respondent discharged to avoid "full, prompt, and in proper form, payment" of his wages) (sixth cause of action); Injunction and Treble Damages for violation of Business and Professions Code section 17200 (appellants' "failure to pay full and prompt wages" to respondent was done for the purpose of injuring respondent and appellants' competitors) (seventh cause of action); fraud (appellants falsely represented that they would retroactively pay salary and benefits to induce respondent's continued employment) (eighth cause of action); "Fraud - Fraudulent

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for an award of interest from the date that the wages were due and payable in any action brought for the nonpayment of wages.

[5] Labor Code section 203 now provides, and formerly provided (Stats. 1997, ch. 92, § 1, p. 611), in pertinent part: "If an employer willfully fails to pay, without abatement or reduction, in accordance with Sections 201 . . . , any wages of an employee who is discharged or who quits, the wages of the employee shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced; but the wages shall not continue for more than 30 days." The first amended complaint alleged that, under Labor Code section 203, respondent was entitled to a penalty of $10,000 (30 days of pay).

[6] During respondent's alleged period of employment, former Labor Code section 204, subdivision (a), provided in pertinent part: "All wages, other than those mentioned in Section 201, 202, 204.1, or 204.2, earned by any person in any employment are due and payable twice during each calendar month, on days designated in advance by the employer as the regular paydays." (Stats. 1989, ch. 469, § 1, p. 1676.)

[7] Labor Code section 212, subdivision (a)(1), sets forth the prohibited forms of payment of wages. "Any order, check, draft, note, memorandum, or other acknowledgment of indebtedness" is a prohibited form of payment "unless it is negotiable and payable in cash, on demand, without discount . . . . , and at the time of its issuance and for a reasonable time thereafter, which must be at least 30 days, the maker or drawer has sufficient funds in, or credit, arrangement, or understanding with the drawee for its payment."

Inducement to Enter Contract" (appellants "did not intend to honor compensation terms set forth in the Employment Agreement") (ninth cause of action); "Fraud - Intentional Misrepresentation" (tenth cause of action); "Fraud - Suppression of Fact" (eleventh cause of action); accounting (twelfth cause of action); declaratory relief (thirteenth cause of action), and conversion (conversion of his wages) (fourteenth cause of action).[8]

On April 19, 2010, the trial court (Elfving, J.) indicated on the record that the parties had just reached a settlement, which would be against Sonasoft. Counsel for respondent orally recited the terms of the settlement on the record. The settlement required Sonasoft to pay respondent a total of $227,000 and to execute a note bearing no interest but providing for reasonable attorney fees and cost for any breach. It established a payment schedule of eight quarterly payments of $25,000 and a ninth, final quarterly payment of $27,000. The first scheduled payment was set for April 30, 2010, and the last scheduled payment was set for April 1, 2012. Sonasoft was allowed a five-day grace period to make each payment, and the balance owing became "due and owing" if a payment was missed. The settlement required a mutual release to be circulated and executed by the parties by April 30, 2010.

The settlement provided for the trial court to retain jurisdiction over the settlement until Sonasoft's final payment. It required respondent to dismiss Andy from the lawsuit with prejudice upon the parties' execution of the mutual release and to dismiss the action against Sonasoft with prejudice at the time the note was fully paid; each party was to bear its own attorney fees and costs. Upon Sonasoft's full performance, respondent was required to return to Sonasoft the 95,000 shares of Sonasoft stock held by him.

Respondent and Andy indicated their assent to the settlement's terms on the record. The trial court was satisfied that the parties and their counsel understood and

[8] By order filed July 7, 2009, the trial court (Levinger, J.) sustained appellants' demurrer to the first amended complaint's eighth cause of action for fraud without leave to amend.

agreed to the terms of the settlement agreement, and the court indicated that the settlement would by judicially supervised. The court set a hearing for a dismissal after settlement for the first Thursday in August 2012.

The trial court (Elfving, J.) issued a formal, written order, filed September 23, 2010, which recited that "the matter" had "c[o]me on for trial on April 19, 2010." The order approved the settlement and stated its provisions consistent with oral recitation of the settlement. The order contained language indicating that the order had been approved as to form by Andy, who signed it on behalf of both Sonasoft and himself; his signatures were dated September 17, 2010.

On December 9, 2010, the trial court (Mckenney, J.) entered a money judgment of $173,000 against only Sonasoft; it credited Sonasoft with payments of $54,000 against the total settlement of $227,000. The judgment stated that it was entered pursuant to the court's order approving the settlement that was attached as exhibit A, and the September 23, 2010 order was attached to the judgment as exhibit A. The judgment included a notation "*to be paid in installments."

Respondent filed a "Memorandum of Costs After Judgment, Acknowledgement of Credit, and Declaration of Accrued Interest" (memorandum of costs after judgment), dated June 25, 2012. It claimed total postjudgment costs of $118,819, which included $111,564 in attorney fees. It acknowledged "total credit to date (including returns on levy process and direct payments) in the amount of: $65,556." It declared the accrued interest on the judgment to be $19,439.

On July 10, 2012, Sonasoft filed a noticed motion to tax costs. Respondent filed opposition to Sonasoft's motion to tax costs, which included an argument that he was entitled to recover attorney fees under Labor Code section 218.5. Sonasoft replied to respondent's opposition.

On August 21, 2012, the trial court (Yew, J.) held an initial hearing on Sonasoft's motion to tax costs. Sonasoft's counsel, then Mary Nolan, understood that the judgment

had been entered "on the basis of a court approved settlement agreement." But Nolan claimed that the settlement agreement was never merged or incorporated into the judgment. She asserted that the settlement agreement did not entitle respondent to "an award of attorney fees using the avenue he ha[d] used [i.e., a memorandum rather than a noticed motion]." She further contended that the judgment made no reference to attorney fees, that their settlement agreement provided for "the amount due" "to be memorialized in a note bearing no interest," and that reasonable attorney fees were available only if the note was not paid according to its terms. She maintained that the settlement agreement's "attorney fee provision was limited to breach of the terms of a note," but she pointed out "[t]here is no note." She asserted that the Labor Code was irrelevant and that the Labor Code issue did not "survive the settlement agreement." At the end of the hearing, the court ordered respondent's counsel to provide a detailed cost bill by September 7, 2012.

Respondent's counsel filed a supplemental declaration in support of respondent's opposition to Sonasoft's motion to tax costs, and Sonasoft filed opposition to the declaration and a request to strike it in part. Respondent filed a reply and a further supporting declaration of his counsel.

In an order filed January 7, 2013, the trial court (Yew, J.) partially ruled on Sonasoft's motion to tax costs. The court concluded that respondent was entitled to attorney fees under Labor Code section 218.5, pursuant to section 685.040 based on its "otherwise provided by law language," but only to the extent that the claimed fees were the reasonable and necessary costs of enforcing a judgment. It determined that a further hearing would be held to address the reasonableness and necessity of the claimed attorney fees, Sonasoft's objections to the actual costs claimed by respondent, and the issue of postjudgment interest.

On January 29, 2013, the trial court (Yew, J.) held a hearing related to respondent's ex parte application to modify his previously filed memorandum of costs after judgment to include costs, attorney fees, and interest from June 1, 2012 through

January 31, 2013. On March 18, 2013, at the time scheduled for a further hearing on appellants' motion to tax costs, the trial court allowed respondent's counsel to file a response to appellants' papers by March 27, 2013, and it ordered the matter submitted as of March 27, 2013.

On June 10, 2013, the trial court (Yew, J.) issued an order awarding costs in the amount of $6,186.21, attorney fees in the amount of $153,840, and postjudgment interest in the amount of $26,794.54. By order filed June 27, 2013, the court amended its award to add an award of costs in the amount of $6,368.44, which respondent had incurred from July 6, 2010 through May 31, 2012.[9] Also on June 27, 2013, the first amended judgment, which incorporated the postjudgment awards, was entered against Sonasoft.

The first amended judgment required Sonasoft to pay respondent a total of $193,188, which consisted of costs in the amount of $12,554, attorney fees in the amount of $153,840, and postjudgment interest in the amount of $26,794. It further stated that "[n]othing herein shall preclude Judgment Creditor from seeking attorney's fees, costs and interest subsequent to 1/31/13." The first amended judgment no longer reflected that Sonasoft was required to pay any money damages.

By notice of motion filed July 25, 2013, respondent moved to amend the first amended judgment to add Andy as an additional judgment debtor on the ground that there was such a unity of interest between Andy and Sonasoft that "the separate personalities of Sonasoft and Andy Khanna no longer exist" and that "if Andy Khanna's acts were treated as those of Sonasoft Corporation alone, an inequitable result would follow." The motion was set to be heard on August 20, 2013.

On August 8, 2013, Sonasoft filed a notice of appeal from the judgment or order entered on June 10, 2013, identifying it as a judgment after court trial.

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[9] The date July 6, 2010 was five days (the grace period) after July 1, 2010, the due date of the second quarterly settlement payment.

Appellants' opposition to the motion to add Andy to the first amended judgment as a judgment debtor on an alter ego theory was filed on August 9, 2013. Andy's supporting declaration was also filed on August 9, 2013.

On August 20, 2013, at the time scheduled for a hearing on the motion to add Andy as a judgment debtor, the trial court (McKenny, J.) indicated that it would give respondent's counsel an opportunity to file a reply to appellants' opposition papers. The matter was continued to September 10, 2013. Respondent's counsel filed a reply to appellants' opposition papers and the supporting declaration of his counsel.

On September 10, 2013, respondent's counsel did not appear. Appellants' counsel told the trial court (McKenney, J.) that he had not notified respondent's counsel that he would be appearing to contest the court's tentative ruling. He nevertheless wished to respond to the court's tentative ruling granting leave to amend the judgment to add Andy as a judgment debtor. The court refused to discuss the motion in the absence of respondent's counsel.[10] The court signed an order, filed September 12, 2013, granting respondent's motion adding Andy to the judgment as an additional judgment debtor. The court made no findings and provided no reasoning for its ruling.

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[10] The Superior Court of Santa Clara County, Civil Rules of Court, rule 8(E) provides as to tentative rulings: "The Court follows CRC 3.1308(a)(1) for those departments that have elected to issue tentative rulings in civil law and motion and discovery matters. Counsel and litigants are responsible for determining whether the department hearing their motion has made this election. Those departments issuing tentative rulings will do so generally by 2:00 p.m., and no later than 3:00 p.m., on the court day preceding the scheduled hearing. If the Court has not directed oral argument, a party contesting a tentative ruling must give notice of its intention to appear to the other side and the Court no later than 4:00 p.m. on the court day preceding the scheduled hearing. . . . The tentative ruling will automatically become the order of the Court on the scheduled hearing date if the Court has not directed oral argument and if the contesting party fails to timely notice an objection to the other side and the Court. . . ." (<http://www.scscourt.org/court_divisions/civil/civil_rules/civil_rule8.shtml#E>[as of June 22, 2016].) Under California Rules of Court, rule 3.1308(a)(1), "[t]he tentative ruling will become the ruling of the court if the court has not directed oral argument by its tentative ruling and notice of intent to appear has not been given."

On September 24, 2013, a second amended judgment, adding "Andy Kahanna, CEO, President and Founder of Sonasoft Corporation" as an additional judgment debtor, was entered. That judgment was otherwise unchanged from the first amended judgment.

On November 8, 2013, Sonasoft and Andy filed a notice of appeal from the September 12, 2013 order and the September 24, 2013 second amended judgment.

Discussion

A. *Threshold Issues*

1. *Notices of Appeal*

a. *No Appeal from Original Judgment*

Apparently, there was no appeal from the original money judgment entered December 9, 2010, which represented the unpaid balance of the $227,000 settlement. That original money judgment against Sonasoft became final, and Sonasoft does not challenge it here.

b. *Notice of Appeal Filed on August 8, 2013*

Sonasoft's notice of appeal, filed August 8, 2013, specified that the appeal was from the judgment or order entered on June 10, 2013 and that it was a "[j]udgment after court trial." Sonasoft's notice did not expressly refer to the first amended judgment entered on June 27, 2013.

We asked the parties to submit supplemental briefing discussing whether this court could review the June 27, 2013 order and the first amended judgment entered on June 27, 2013 based upon Sonasoft's August 8, 2013 notice of appeal. Sonasoft asks us to liberally construe that notice of appeal. Respondent asserts that Sonasoft noticed an appeal only from the June 10, 2013 order and that this court must dismiss Sonasoft's appeal because the June 10, 2013 order was not the final judgment and because the June 27, 2013 order and first amended judgment represented a substantial change in the rights and duties of the parties.

Ordinarily, a postjudgment order awarding postjudgment costs or attorney fees is appealable as an order after judgment (§ 904.1, subd. (a)(2)), see *Kajima Engineering and Construction, Inc. v. Pacific Bell* (2002) 103 Cal.App.4th 1397, 1402.) In this case, however, the June 10, 2013 order was superseded by the amended order adding further costs, and the postjudgment awards were incorporated into the first amended judgment.[11]

The August 8, 2013 notice of appeal was timely filed following the entry of the first amended judgment, and the notice indicated that the appeal was being taken from a judgment. "[A]n appeal will not be dismissed because of a misdescription of the judgment or order to which it relates unless it appears that the respondent has been misled by such misdescription. [Citations.]" (*Title Guarantee & Trust Co. v. Lester* (1932) 216 Cal. 372, 374.) "An incorrect date in the notice of appeal will not necessarily invalidate it. *Title Guarantee & Trust Co. v. Lester*, 216 Cal. 372, 374." (*Holden v. California Emp. etc. Com.* (1950) 101 Cal.App.2d 427, 431.) We conclude that Sonasoft's August 8, 2013 notice of appeal may be liberally construed to refer to the first amended judgment entered June 27, 2013 since there is no indication that respondent was misled to his prejudice. (See Cal. Rules of Court, rule 8.100(a)(2).)[12]

c. *Notice of Appeal Filed November 8, 2013*

Both Sonasoft and Andy filed a notice of appeal from the second amended judgment that added Andy as a second judgment debtor. In response to our request for supplemental briefing, the parties agree that Sonasoft was not an aggrieved party (§ 902) with respect to the order granting respondent's motion to amend the judgment to add Andy as a judgment debtor and the second amended judgment.

"Although standing to appeal is construed liberally, and doubts are resolved in its favor, only a person aggrieved by a decision may appeal. [Citations.] An aggrieved

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[11] On appeal, Sonasoft raises no procedural contention that the trial court acted improperly in amending the judgment to incorporate the postjudgment awards.

[12] All further rule references are to the California Rules of Court.

person, for this purpose, is one whose rights or interests are injuriously affected by the decision in an immediate and substantial way, and not as a nominal or remote consequence of the decision. [Citations.]" (*In re K.C.* (2011) 52 Cal.4th 231, 236 (*K.C.*).)

We agree that the addition of Andy as a judgment debtor did not injuriously affect Sonasoft's rights or interests. Sonasoft has no standing to challenge the second amended judgment's addition of Andy as a judgment debtor. (See *K.C.*, *supra*, 52 Cal.4th at p. 236; see § 902 ["Any party aggrieved may appeal . . . ."].) Sonasoft is an aggrieved party, however, with respect to the postjudgment awards of costs, attorney fees, interest incorporated into the first amended judgment from which we find Sonasoft timely appealed.

2. *Respondent's Motion to Strike Appellants' Brief and Portions of their Appendix*

Respondent has moved to strike allegedly "confidential documents" included in appellants' appendix and to strike appellants' opening brief on the ground that it is defective because it cites those documents. Respondent has not established that the documents that he now asks this court to strike from appellants' appendix are "confidential records" within the meaning of the California Rules of Court. (See rules 8.45-8.47.)

The challenged documents included in appellants' appendix mainly fall into two categories: (1) copies of documents contained in certain exhibits attached to Andy's declaration, filed August 9, 2013 in support of appellants' opposition to adding Andy as a judgment debtor, and references to those exhibits in that declaration and (2) copies of documents contained in certain exhibits attached to Andy's supplemental declaration, filed March 20, 2014 in support of appellants' reply in support of their motion for a stay of enforcement proceedings pending appeal (motion to stay), and references to those exhibits in that declaration.

Respondent also challenges part of an exhibit attached to appellants' opposition to respondent's motion to add Andy as a judgment debtor. The exhibit contained the reporter's transcript of the January 29, 2013 hearing related to respondent's memorandum of costs after judgment and appellants' motion to tax costs. The trial court's rulings on appellants' motion to tax costs and on respondent's motion to add Andy as a judgment debtor are under review in this appeal, and a reporter's transcript of that hearing is part of the record on appeal in this case.

Respondent asserts that the allegedly confidential documents constitute evidence that is inadmissible under Evidence Code sections 1152 (evidence of offer to compromise inadmissible to prove liability) and 1154 (evidence of offer to discount inadmissible to prove invalidity of claim). He additionally argues those documents must be stricken because they are no longer part of the trial record, they are unnecessary to the appeal, or they relate to post-appeal matters.

As to respondent's evidentiary objections, the filing of an appendix does not admit documents "into evidence" in this court. We are a court of review and, except in the extremely rare situation where we take additional evidence (see § 909), our role is to review the record that was before the trial court when it ruled. "It has long been the general rule and understanding that 'an appeal reviews the correctness of a judgment [or an order] as of the time of its rendition, upon a record of matters which were before the trial court for its consideration.' [Citation.]" (*In re Zeth S.* (2003) 31 Cal.4th 396, 405 (*Zeth S.*).) A party's failure to interpose a timely objection to evidence in the trial court waives the evidentiary objection. (Evid. Code, § 353.) We will not strike any portion of appellants' appendix based on respondent's current Evidence Code objections.

"The record on appeal is a collection of papers that reflects the proceedings in the lower court and is physically transmitted to the reviewing court." (9 Witkin, Cal. Proc. (5th ed. 2008) Appeal, § 626, pp. 702-703.) An appellant in a civil case may choose to provide a record of the written documents from the superior court proceedings in the

form of an appendix rather than a clerk's transcript. (Rules 8.120(a)(1), 8.124.) The contents of an appellant's appendix are established by court rule. (Rule 8.124(b)(1).)

In general, if written documents are part of the superior court record and are necessary for proper consideration of the issues on appeal, they may be included in an appellant's appendix. (See Rule 8.124(b)(1) & (g).) "An appellant's appendix may only include copies of documents that are contained in the superior court file. (Cal. Rules of Court, rule 8.124(g).)" (*The Termo Co. v. Luther* (2008) 169 Cal.App.4th 394, 404.) "All exhibits admitted in evidence, refused, or lodged are deemed part of the record, whether or not the appendix contains copies of them." (Rule 8.124(b)(4).)

"As a general rule, documents not before the trial court cannot be included as a part of the record on appeal. [Citation.]" (*Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 184, fn. 1; cf. § 909.) An appendix cannot "[c]ontain documents or portions of documents filed in superior court that are unnecessary for proper consideration of the issues." (Rule 8.124(b)(3)(A).)

We reject respondent's assertion that particular exhibits attached to Andy's August 9, 2013 declaration, which was filed in support of appellants' opposition to respondent's motion to add Andy as a judgment debtor, and references to those particular exhibits in that declaration are unnecessary to this appeal. The court's ruling on respondent's motion is under review in this case, and that declaration (and the attached exhibits) and the opposition papers (and the attached exhibits) appear to have been part of the record before the trial court when it ruled on the motion.

Insofar as respondent is asserting that Andy's March 20, 2014 supplemental declaration and the attached exhibits are unnecessary "for proper consideration of the issues" on appeal because that declaration was filed subsequent to the matters under review (Rule 8.124(b)(3)(A)), we agree. "It is an elementary rule of appellate procedure that, when reviewing the correctness of a trial court's judgment [or order], an appellate court will consider only matters which were part of the record at the time the judgment

[or order] was entered. [Citation.]" (*Reserve Insurance Co. v. Pisciotta* (1982) 30 Cal.3d 800, 813 (*Reserve Insurance*); see *Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3 (*Vons Companies*).) We therefore grant respondent's motion to strike Andy's March 20, 2014 supplemental declaration (and appended exhibits), and we will not consider it in evaluating the merits of appellants' contentions on appeal.

Respondent has presented evidence that the trial court, in a June 9, 2014 order,[13] struck a number of exhibits attached to Andy's March 20, 2014 supplemental declaration on the ground they were inadmissible under Evidence Code section 1152. But an interpretation that the order retroactively deleted *all copies* of the documents contained in those stricken exhibits from the superior court file wherever they appeared would be nonsensical. As indicated, evidentiary objections are waived if they are not timely interposed (Evid. Code, § 353), appellate courts review the correctness of a judgment or order as of the time of its rendition based upon a record of what was before the court for its consideration (*Zeth S., supra*, 31 Cal.4th at p. 405), and "[a]ll exhibits admitted in evidence, refused, or lodged are deemed part of the record . . . ." (Rule 8.124(b)(4).) Respondent has not established that the order was intended to purge the superior court's file, rather than to simply remove the stricken exhibits, and the supplemental declaration's references thereto, from the court's consideration in ruling on appellants' motion to stay. Accordingly, we reject any contention that all *copies* of the documents contained in the exhibits stricken by the June 9, 2014 order were thereby deleted from the superior court record and, therefore, this court must strike them from appellants' appendix.

[13] In a separate appeal *Khanna v. Sonasoft Corporation et al.* (H041128), appellants seek to challenge the June 9, 2014 order. On our own motion, this court ordered this appeal to be considered together with case No. H041128 for purposes of briefing, oral argument, and decision.

We will disregard any reference in the appellants' opening brief to Andy's March 20, 2014 supplemental declaration. We find it unnecessary to strike appellants' opening brief.

3. *Disentitlement Doctrine*

Respondent has suggested that we dismiss the appeals under the disentitlement doctrine. "An appellate court has the inherent power to dismiss an appeal by a party that refuses to comply with a lower court order. (*Stoltenberg v. Ampton Investments, Inc*. (2013) 215 Cal.App.4th 1225, 1229 (*Stoltenberg*).) This doctrine of disentitlement is not jurisdictional, but is a discretionary tool that may be used to dismiss an appeal when the balance of the equitable concerns makes dismissal an appropriate sanction. (*Id*. at p. 1230.)" (*Gwartz v. Weilert* (2014) 231 Cal.App.4th 750, 757 (*Gwartz*).) "The disentitlement doctrine 'is particularly likely to be invoked where the appeal arises out of the very order (or orders) the party has disobeyed.' (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2014) ¶ 2:340, p. 2-203.) Moreover, the merits of the appeal are irrelevant to the application of the doctrine. [Citation]." (*Ironridge Global IV, Ltd. v. ScripsAmerica, Inc*. (2015) 238 Cal.App.4th 259, 265.)

As a general principle, "[a] party to an action cannot, with right or reason, ask the aid and assistance of a court in hearing his demands while he stands in an attitude of contempt to legal orders and processes of the courts of this state. [Citations.]" (*MacPherson v. MacPherson* (1939) 13 Cal.2d 271, 277.) "No formal judgment of contempt is required under the doctrine of disentitlement. [Citation.] An appellate court may dismiss an appeal where the appellant has willfully disobeyed the lower court's orders or engaged in obstructive tactics. [Citation.]" (*Gwartz, supra*, 231 Cal.App.4th at pp. 757-758.)

"The disentitlement doctrine has been applied to a wide range of cases, including cases in which an appellant is a judgment debtor who has frustrated or obstructed legitimate efforts to enforce a judgment. (E.g., *Stoltenberg, supra*, 215 Cal.App.4th 1225

[defendants repeatedly, and in contempt of sister-state orders, frustrated the enforcement of the Cal. judgment that was the subject of their appeal]; *TMS, Inc. v. Aihara* (1999) 71 Cal.App.4th 377 [appeal dismissed where, despite trial court's order, defendants willfully refused to respond to postjudgment interrogatories]; *Stone v. Bach* (1978) 80 Cal.App.3d 442 [appellant disobeyed a prejudgment order directing the deposit of partnership funds collected by him into a trustee account and, after the judgment, was found in contempt for failing to appear at a judgment debtor examination].)" (*Gwartz, supra*, 231 Cal.App.4th at p. 758.)

In *Stoltenberg*, the appellate court dismissed an appeal of the defendants (an individual and a corporation) from a judgment against them, for which they had not posted a bond to stay enforcement, under the disentitlement doctrine. (*Stoltenberg, supra*, 215 Cal.App.4th at pp. 1227, 1234.) Dismissal was found to be warranted because a trial court had ordered the defendants "to respond to a postjudgment discovery designed to obtain information to aid in the enforcement of the judgment being appealed" and they had been "found to be in contempt of that order." (*Id.* at p. 1232.)

In *TMS, Inc. v. Aihara, supra*, 71 Cal.App.4th 377 the appellate court dismissed the appeal of two corporate defendants, one of which was the wholly owned subsidiary of the other, from a money judgment against them because they willfully disobeyed a court order requiring them to answer the postjudgment interrogatories aimed at enforcement of the judgment. (*Id.* at pp. 378-380.) It was undisputed that they had willfully refused to comply with that order. (*Id.* at p. 380.) The individual who was the sole shareholder of the parent corporation had left the jurisdiction and moved to Japan, and he refused "to assist his attorneys in answering the post-judgment interrogatories." (*Id.* at pp. 379-380.)

In *Stone v. Bach, supra*, 80 Cal.App.3d 442, an action for partnership dissolution and an accounting, the appellate court dismissed a former partner's appeal. (*Id.* at pp. 443, 449.) The trial court had twice found the former partner to be in contempt, although it had not imposed any penalty. (*Id.* at pp. 443-444) Before trial, the court had

found that the former partner had knowingly violated, "in 13 specific instances," an order "requiring him to deposit into specified accounts all partnership receipts in his possession." (*Id*. at p. 443.) After the judgment, the court had found the former partner in contempt "for refusing to be sworn for examination as a judgment debtor. [Citation.]" (*Id*. at p. 444.)

In this case, respondent maintains that appellants engaged in obstructionist tactics and willful disobedience of court orders and offers a litany of asserted misconduct by appellants. Respondent fails to provide a single citation to the appellate record to support those claims of wrongdoing. (See Rule 8.204(a).) "It is not the task of the reviewing court to search the record for evidence that supports the party's statement; it is for the party to cite the court to those references." (*Regents of University of California v. Sheily* (2004) 122 Cal.App.4th 824, 826, fn. 1.)

Respondent has not shown that either appellant has been held in contempt or sanctioned for conduct related to enforcement of the judgment. A November 2014 trial court order (Elfving, J.) indicates that appellants posted a bond equal to 1.5 times the amount of the first amended judgment and second amended judgment ($289,782).

Disentitlement doctrine is a discretionary tool. (See *Stoltenberg, supra*, 215 Cal.App.4th at p. 1230.) Respondent has not persuaded us that the balance of equities weigh in favor of dismissing the appeals.

B. *Postjudgment Costs, Attorney Fees, and Interest*

1. *Forfeiture Rule*

We asked the parties to submit supplemental briefing addressing whether Sonasoft forfeited its contention that the "Mutual Release and Settlement Agreement"[14] (mutual

[14] Appellants' appendices include a multi-page "Mutual Release and Settlement Agreement," apparently separately executed by the parties in counterpart copy at various times subsequent to their settlement. A version signed by respondent is attached as an exhibit to appellants' opposition to respondent's motion to amend the judgment to add Andy as a judgment debtor, filed August 9, 2013. A version signed by respondent is also

release agreement) barred recovery of postjudgment costs, attorney fees, and interest by failing to present evidence of the mutual release agreement and failing to timely raise that contention in support of its motion to tax costs filed July 10, 2012. Its briefs confusingly do not differentiate between the judicially supervised settlement, pursuant to which the original judgment was entered, and the separate mutual release agreement executed subsequent to the settlement.

"The forfeiture rule generally applies in all civil and criminal proceedings. [Citations.] The rule is designed to advance efficiency and deter gamesmanship." (*Keener v. Jeld-Wen, Inc*. (2009) 46 Cal.4th 247, 264.) "Ordinarily, an appellate court will not consider a claim of error if an objection could have been, but was not, made in the lower court. [Citation.] The reason for this rule is that '[i]t is both unfair and inefficient to permit a claim of error on appeal that, if timely brought to the attention of the trial court, could have been easily corrected or avoided.' [Citations.] '[T]he forfeiture rule ensures that the opposing party is given an opportunity to address the objection, and it prevents a party from engaging in gamesmanship by choosing not to object, awaiting the outcome, and then claiming error.' [Citation.]" (*People v. French* (2008) 43 Cal.4th 36, 46.)

In addition, "the first rule of appellate practice is that a ruling of the trial court may be reversed on appeal only if the trial court erred. A trial court's failure to consider evidence not before it . . . is not, and cannot be, error." (*Toho-Towa Co., Ltd. v. Morgan Creek Productions, Inc*. (2013) 217 Cal.App.4th 1096, 1106 (*Toho-Towa*).) "[N]ormally 'when reviewing the correctness of a trial court's judgment, an appellate court will consider only matters which were part of the record at the time the judgment was

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attached as an exhibit to a declaration of Andy, also filed August 9, 2013. Appellants' reply appendix contains a version signed by Andy on behalf of Sonasoft and himself, but there is no file stamp indicating that it was filed in the superior court.

entered.' (*Reserve Insurance Co. v. Pisciotta* (1982) 30 Cal.3d 800, 813.)" (*Vons Companies, supra*, 14 Cal.4th at p. 444, fn. 3.)

Sonasoft fails to show by specific reference to the appellate record that, in support of its motion to tax costs, it presented evidence of the mutual release agreement or clearly argued that the mutual release agreement barred recovery of postjudgment costs, attorney fees, or interest. As Sonasoft acknowledges, the original judgment (with the attached September 23, 2010 order) was submitted in support of its motion to tax costs for the August 21, 2012 hearing. Sonasoft concedes that the mutual release agreement was not part of the evidence presented in support of its motion. Therefore, Sonasoft's claim on appeal that the mutual release agreement barred respondent's recovery of postjudgment costs, attorney fees, and interest was forfeited.

2. *Analysis*

a. *Postjudgment Costs and Attorney Fees*

Appellants first argue that respondent is not entitled to attorney fees and costs incurred to enforce the judgment pursuant to section 685.040 because respondent waived attorney fees and costs in the settlement.[15] Even assuming that this claim was preserved for appellate review, we reject it.

The September 23, 2010 order setting forth the provisions of the settlement, which was signed by Andy on behalf of Sonasoft and himself, did not include an express waiver of postjudgment costs, attorney fees, or interest in the event that a money judgment was entered against Sonasoft after Sonsasoft failed to execute a promissory note as required by the settlement,[16] Sonasoft defaulted on its payment obligations under the settlement, and the unpaid balance of $227,000 became due and owing. The judgment itself does not

[15] Sonasoft is challenging respondent's entitlement to attorney fees and costs, not the amount of those awards.

[16] The word "execute" means "[t]o make (a legal document) valid by signing; to bring (a legal document) into its final, legally enforceable form." (Black's Law Dict. (10th ed. 2014) p. 689.)

reflect any express waiver of postjudgment costs, attorney fees, or interest to which respondent would otherwise be entitled by statute. In moving to tax costs, Sonasoft did not establish that the settlement necessarily implied that respondent waived postjudgment costs, attorney fees, and interest as to any money judgment entered against it.

Postjudgment costs and attorney fees to the extent authorized by law are ordinarily incidents of a judgment. Section 685.040 provides: "The judgment creditor is entitled to the reasonable and necessary costs of enforcing a judgment. Attorney's fees incurred in enforcing a judgment are not included in costs collectible under this title unless otherwise provided by law. Attorney's fees incurred in enforcing a judgment are included as costs collectible under this title if the underlying judgment includes an award of attorney's fees to the judgment creditor pursuant to subparagraph (A) of paragraph (10) of subdivision (a) of Section 1033.5." Section 1033.5, subdivision (a), states in pertinent part: "The following items are allowable as costs under Section 1032: . . . [¶] . . . [¶] (10) Attorney's fees, when authorized by any of the following: (A) Contract."

The original judgment did not include an attorney fee award based on contract. But Labor Code section 218.5, subdivision (a) provides in pertinent part: "In any action brought for the nonpayment of wages, fringe benefits, or health and welfare or pension fund contributions, the court shall award reasonable attorney's fees and costs to the prevailing party if any party to the action requests attorney's fees and costs upon the initiation of the action."

In a written order concerning appellants' motion to tax costs, filed on January 7, 2013, the trial court (Yew, J.) determined that respondent was entitled to postjudgment attorney fees, relying upon the "otherwise provided by law" language in section 685.040. It further found *Berti v. Santa Barbara Beach Properties* (2006) 145 Cal.App.4th 70 (*Berti*) "stands for the proposition that post-judgment attorney's fees in enforcing a judgment are allowable if authorized by statute." The court concluded that respondent was entitled to attorney fees under Labor Code section 218.5 because he sued Sonasoft

for nonpayment of wages, he "affirmatively and timely plead[ed] an entitlement to recovery of attorney's fees" under that section, and "[t]he claim for nonpayment of wages was the heart of this lawsuit."

Appellants assert that Labor Code section 218.5 does not authorize statutory fees in this case because only $43,000 of the settlement was attributable to a wage claim.[17] They do not dispute that Labor Code section 218.5 applies if nonpayment of wages was the gravamen of the lawsuit. (See Kirby v. Immoos Fire Protection, Inc. (2012) 53 Cal.4th 1244, 1256 [Labor Code section 218.5 did not apply because "[n]onpayment of wages is not the gravamen of a [Labor Code] section 226.7 violation" for failure to provide meal or rest breaks].) Instead, they argue that this case "was a collection action," "not a lawsuit under the Labor Code."

Both the original complaint and the first amended complaint indicate that the crux of respondent's lawsuit was appellants' alleged failure to pay wages to respondent. The $227,000, which Sonasoft was required to pay under the settlement, possibly included, in addition to unpaid wages, a statutory penalty for failure to pay respondent's wages upon termination of employment (Lab. Code, § 203) , "reasonable attorney's fees and costs" (Lab. Code, § 218.5), and interest on the unpaid wages from the date they were due and payable (Lab. Code, § 218.6) as pleaded. Nevertheless, the gravamen of the lawsuit remained the nonpayment of wages.

Sonasoft also argues that the *Berti* case, upon which the trial court relied, is distinguishable because, in contrast to *Berti*, "the settlement agreement" in this case did not merge into the judgment and was not silent as to postjugment fees and costs. Since this argument appears to invoke the mutual release agreement that was not raised below,

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[17] As indicated, the first amended complaint alleged that respondent was owed $28,380 in unpaid wages and a $15,000 bonus, a total of $43,380, plus wages of $960 for his accrued vacation time when his employment with Sonasoft ended on about March 31, 2006.

it was forfeited. The settlement, which was judicially approved by the September 23, 2010 order, was merged in the judgment entered against Sonasoft.

In *Berti*, limited partners filed a petition for writ of mandate against the partnership and its general partners for refusing to allow them to inspect and copy its financial records in violation of former Corporations Code section 15634, which gave "a limited partner the right to inspect the partnership's books and records." (*Berti*, *supra*, 145 Cal.App.4th at p. 72) The trial court granted the petition and issued a peremptory writ of mandate. (*Ibid*.) The trial court held the limited partnership in contempt, but allowed the parties to reach a settlement. (*Ibid*.) "By stipulation of the parties, the settlement agreement was entered as a judgment." (*Id*. at p. 73.) Although the settlement was silent as to postjudgment attorney fees, former Corporations Code section 15634 provided for recovery of reasonable expenses and attorney fees in an action under that section if the court found that the failure of the partnership to comply with the section's requirements had been without justification. (*Berti*, *supra*, at p. 74.) The appellate court held that "[p]ostjudgment attorney fees [were] available under [former Corporations Code] section 15634, subdivisions (g) and (h), notwithstanding the silence of the [parties' settlement] agreement and judgment." (*Id*. at p. 72.)

Berti rejected an argument that, because the plaintiff's action had been settled and dismissed under their agreement, "the postjudgment motions were not brought in an action under [former Corporations Code] section 15634." (*Berti*, *supra*, 145 Cal.App.4th at pp. 74-76.) The appellate court in *Berti* concluded that the settlement agreement had merged into the judgment and that, under the settlement, the trial court retained jurisdiction to enforce the settlement. (*Id*. at p. 75.) *Berti* concluded that statutory attorney fees were an incident to the judgment. (*Id*. at p. 77.)

As in *Berti*, the parties in this case agreed to a judicially supervised settlement. As in *Berti*, a judgment was entered pursuant to the parties' judicially supervised settlement.

Absent waiver, respondent was entitled to attorney fees authorized by a statute as an incident of the judgment. (§ 685.040.)

Sonsasoft argues that, unlike *Berti*, postjudgment fees and costs were "expressly waive[d]" in this case "except in the case of breach of the note that was never executed" by it.[18] Neither the settlement as set forth in the September 23, 2010 order nor the judgment entered pursuant thereto expressly waived postjudgment costs or attorney fees incident to a money judgment. The settlement was, in fact, silent as to respondent's recovery of such costs and fees incident to a money judgment. We cannot say that such costs and fees were expressly waived, or by necessary implication excluded, by the settlement. (Cf. *Folsom v. Butte County Assn. of Governments* (1982) 32 Cal.3d 668, 676-681.)

"The trial court's authority to award postjudgment fees is a legal question that we independently review. (*Globalist Internet Technologies, Inc. v. Reda* (2008) 167 Cal.App.4th 1267, 1273; *Jaffe v. Pacelli* (2008) 165 Cal.App.4th 927, 934.)" (*Ronald P. Slates, APC v. Gorabi* (2010) 189 Cal.App.4th 1210, 1213.) It is our conclusion that respondent was entitled to postjudgment costs and attorney fees pursuant to statute (§ 685.040; Lab.Code, § 218.5).

b. *Postjudgment Interest*

"Interest accrues at the rate of 10 percent per annum on the principal amount of a money judgment remaining unsatisfied." (§ 685.010, subd. (a); see Cal. Const., art. XV, § 1.) Ordinarily, a " final judgment 'bears interest at the legal rate from its date of entry by force of law, regardless of whether [or not] it contains a declaration to that effect.'

[18] At the August 21, 2012 hearing on Sonasoft's motion to tax, the trial court (Yew, J.) asked respondent's counsel why he did not "write the [promissory] note." Respondent's counsel indicated that he believed the settlement provided adequate protection without it. Contrary to the implication of Sonasoft's appellate argument, the court did not then determine that the settlement required respondent to prepare the note or that Sonasoft was excused from executing the requisite note because respondent did not prepare it.

[Citation.]"[19] (*Los Angeles Unified School Dist. v. Wilshire Center Marketplace* (2001) 89 Cal.App.4th 1413, 1420.)

Appellants argue that respondent waived his entitlement to postjudgment interest, again relying on the court's September 23, 2010 order approving and setting forth the settlement. They assert that the parties specified that "the debt would 'bear no interest.' " It is true that settlement required Sonasoft to execute a non-interest bearing note, which Sonasoft failed to do. But that settlement did not affirmatively waive postjudgment interest in the event of a money judgment for the unpaid balance of the $227,000 settlement. As stated, the settlement provided that the unpaid balance would be "immediately due and owing" if Sonasoft "miss[ed] a payment when due." The original money judgment represented that unpaid balance, and apparently no appeal was taken from that judgment.

We conclude that respondent is entitled to postjudgment interest as provided by law. (§§ 685.010, subd. (a), 685.020.)

C. *Amendment of Judgment to Add Andy as Judgment Debtor*

1. *Alter Ego Theory*

Andy now argues that the evidence was insufficient to support a determination that he was the alter ego of Sonasoft, and therefore the trial court erred in adding him as a judgment debtor.

"Section 187 of the Code of Civil Procedure grants to every court the power to use all means to carry its jurisdiction into effect, even if those means are not set out in the code. [Citation.] Under section 187, the court has the authority to amend a judgment to

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[19] Section 685.020 provides: "(a) Except as provided in subdivision (b), interest commences to accrue on a money judgment on the date of entry of the judgment. [¶] (b) Unless the judgment otherwise provides, if a money judgment is payable in installments, interest commences to accrue as to each installment on the date the installment becomes due." Under the terms of the settlement, the unpaid balance of $227,000 became "immediately due and owing" if Sonasoft missed a payment.

add additional judgment debtors. [Citation.] [¶] Judgments are often amended to add additional judgment debtors on the grounds that a person or entity is the alter ego of the original judgment debtor. [Citations.] This is an equitable procedure based on the theory that the court is not amending the judgment to add a new defendant but is merely inserting the correct name of the real defendant. [Citations.]" (*NEC Electronics Inc. v. Hurt* (1989) 208 Cal.App.3d 772, 778, fn. omitted.) A "motion to add the alter ego as a judgment debtor is usually based upon an accompanying transcript of the former trial, although the evidence of alter ego liability may be presented for the first time at the hearing of the motion to amend the judgment." (2 Ballantine & Sterling, Cal. Corporation Laws (4th. ed. 2011) § 299.05, p. 14-58.2(12), fn. omitted.)

"Ordinarily, a corporation is regarded as a legal entity, separate and distinct from its stockholders, officers and directors, with separate and distinct liabilities and obligations. [Citations.]" (*Sonora Diamond Corp. v. Superior Court* (2000) 83 Cal.App.4th 523, 538 (*Sonora Diamond Corp.*); see *Merco Constr. Engineers, Inc. v. Municipal Court* (1978) 21 Cal.3d 724, 729.) Thus, " '[t]he mere circumstances that 'all of the capital stock of a corporation is owned or controlled by one or more persons, does not, and should not, destroy its separate existence; were it otherwise, few private corporations could preserve their distinct identity, which would mean the complete destruction of the primary object of their organization.' [Citations.]" (*Dos Pueblos Ranch & Imp. Co. v. Ellis* (1937) 8 Cal.2d 617, 621.) "Because society recognizes the benefits of allowing persons and organizations to limit their business risks through incorporation, sound public policy dictates that imposition of alter ego liability be approached with caution. [Citation.]" (*Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1249.) "[T]he corporate form will be disregarded only in narrowly defined circumstances and only when the ends of justice so require." (*Mesler v. Bragg Management Co.* (1985) 39 Cal.3d 290, 301 (*Mesler*).)

" There is no litmus test to determine when the corporate veil will be pierced; rather the result will depend on the circumstances of each particular case. There are, nevertheless, two general requirements: '(1) that there be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist and (2) that, if the acts are treated as those of the corporation alone, an inequitable result will follow.' (*Automotriz etc. de California v. Resnick* (1957) 47 Cal.2d 792, 796.)" (*Mesler, supra*, 39 Cal.3d at p. 300.) Both requirements must be satisfied to apply the alter ego doctrine. (*Associated Vendors, Inc. v. Oakland Meat Co.* (1962) 210 Cal.App.2d 825, 837 (*Associated Vendors*); *Minifie v. Rowley* (1921) 187 Cal. 481, 487.)

"Under the alter ego doctrine, . . . when the corporate form is used to perpetrate a fraud, circumvent a statute, or accomplish some other wrongful or inequitable purpose, the courts will ignore the corporate entity and deem the corporation's acts to be those of the persons or organizations actually controlling the corporation, in most instances the equitable owners. [Citations.]" (*Sonora Diamond Corp., supra*, 83 Cal.App.4th at p. 538.) "[I]t is not necessary that actual fraud be shown. It is sufficient if a refusal to recognize the fact of the identity of the corporate existence with that of the individual would bring about inequitable results." (*Wenban Estate, Inc. v. Hewlett* (1924) 193 Cal. 675, 698 (*Wenban Estate*).)

"The essence of the alter ego doctrine is that justice be done." (*Mesler, supra*, 39 Cal.3d at p. 301.) " 'The issue is not so much whether, for all purposes, the corporation is the "alter ego" of its stockholders or officers, nor whether the very purpose of the organization of the corporation was to defraud the individual who is now in court complaining, as it is an issue of whether in the particular case presented and for the purposes of such case justice and equity can best be accomplished and fraud and unfairness defeated by a disregard of the distinct entity of the corporate form.' [Citation.]" (*Id.* at pp. 300-301.)

There are a variety of factual circumstances that may warrant application of the alter ego theory. (See *Associated Vendors, supra*, 210 Cal.App.2d at pp. 838-840.) "The figurative terminology 'alter ego' and 'disregard of the corporate entity' is generally used to refer to the various situations that are an abuse of the corporate privilege. [Citations.] The equitable owners of a corporation, for example, are personally liable when they treat the assets of the corporation as their own and add or withdraw capital from the corporation at will [citations]; when they hold themselves out as being personally liable for the debts of the corporation [citation]; or when they provide inadequate capitalization and actively participate in the conduct of corporate affairs. [Citations.]" (*Minton v. Cavaney* (1961) 56 Cal.2d 576, 579-580.)

Other "relevant considerations include: the commingling of funds and other assets; the failure to segregate funds of the individual and the corporation; the unauthorized diversion of corporate funds to other than corporate purposes; the treatment by an individual of corporate assets as his own; the failure to seek authority to issue stock or issue stock under existing authorization; the representation by an individual that he is personally liable for corporate debts; the failure to maintain adequate corporate minutes or records; the intermingling of the individual and corporate records; the ownership of all the stock by a single individual or family; the domination or control of the corporation by the stockholders; the use of a single address for the individual and the corporation; the inadequacy of the corporation's capitalization; the use of the corporation as a mere conduit for an individual's business; the concealment of the ownership of the corporation; the disregard of formalities and the failure to maintain arm's-length transactions with the corporation; and the attempts to segregate liabilities to the corporation. ([*Associated Vendors, supra*, 210 Cal.App.2d] at pp. 838-840.)" (*Mid-Century Ins. Co. v. Gardner* (1992) 9 Cal.App.4th 1205, 1213, fn. 3 (*Mid-Century Ins.*).)

The determination that alter ego theory applies is primarily a question of fact. (See *Alexander v. Abbey of the Chimes* (1980) 104 Cal.App.3d 39, 46 (*Alexander*);

Associated Vendors, *supra*, 210 Cal.App.2d at pp. 837-838.) Ordinarily, "the conclusion of the trier of fact will not be disturbed if it be supported by substantial evidence. [Citations.]" (*Associated Vendors*, *supra*, at pp. 837-838; see *Mid-Century Ins*., *supra*, 9 Cal.App.4th at p. 1213.)

"The trial court's decision to amend a judgment to add a judgment debtor is reviewed for an abuse of discretion. [Citations.] Factual findings necessary to the court's decision are reviewed to determine whether they are supported by substantial evidence. [Citations.]" (*Carolina Casualty Ins. Co. v. L.M. Ross Law Group, LLP* (2012) 212 Cal.App.4th 1181, 1189, fn. omitted; see *Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 711-712.)

3. *Evidence in Support of Motion to Add Andy as a Judgment Debtor*

In support of respondent's motion to add Andy as a judgment debtor on an alter ego theroy, evidence was presented by declaration.

In his declaration, respondent's counsel indicated that, upon termination, Sonasoft paid respondent in stock for his accrued salary even though he had demanded cash.

Excerpts of Andy's January 18, 2008 deposition (which took place more than two years before the settlement) were attached to the declaration of respondent's counsel. During that deposition, Andy indicated that he was in charge of Sonasoft's accounting department as its president and CEO and that he used accounting consultants. Andy also indicated that, in determining what percentage of an employee's wages would be assigned to the category of accrued unpaid salary, he decided the amount that the company could afford to pay a particular individual at a given time. There was no formula or criteria. Andy did not know or remember how he made that determination with respect to respondent's wages.

Respondent's counsel stated, on information and belief, that Andy did not "reduce" the salary of two other employees, Andy's son Neil and another individual who

was the "VP of Engineering and CTO" (Chief Technology Officer). No evidence was presented to substantiate those statements.

In the same January 18, 2008 deposition, Andy indicated that Sonasoft's board of directors could change the fair market value of Sonasoft's stock even if the company was not yet profitable. Andy indicated that the board might consider the company's sales, its products, and the number of its customers in setting the share price. At the deposition, Andy added to the list of potential considerations, apparently facetiously, "the color of [his] tie."

Also during the deposition on January 18, 2008, Andy stated that he did not know who drafted the employee handbook. He indicated that he had been consulted in the drafting process and that he had approved the handbook. He acknowledged that any changes to the handbook would have been approved by him, but he did not know or remember whether there had been any changes to it during 2005 or 2006.

An excerpt of the January 24, 2008 deposition of Romesh Japra, the chairman of Sonasoft's board of directors, (which took place more than two years before the settlement) was attached to the declaration of respondent's counsel. Japra stated during that deposition that the board of directors had not objected to the manner in which Andy was placing salary of employees into an accrued salary category so long as there was a mutual understanding between them. Japra indicated that an employee who left Sonasoft's employment was entitled to full payment in cash if the employee wanted his funds.

An excerpt of Andy's January 14, 2010 deposition (which occurred several months before the settlement) was attached to the declaration of respondent's counsel. In that deposition testimony, Andy acknowledged that an unspecified SEC (Securities and Exchange Commission) filing indicated that the company had approved as of June 30, 2009, a tentative settlement with a former employee who had filed a lawsuit for wrongful termination in 2006, but the tentative settlement was not finalized or agreed upon by both

parties as of August 6, 2009. Andy further acknowledged that, as of June 30, 2009, there had been no tentative settlement with respondent. Andy also confirmed that, as of November 2009, Sonasoft had three directors on its board and that its bylaws provided for four directors.

Respondent's counsel asserted in his declaration that "[t]he decision regarding salary accrual should have been at the sole discretion of the Board of Directors." This may be a reference to respondent's employment agreement with Sonasoft, evidence of which was presented by appellants.

Excerpts of the deposition of Craig Pratt, a human resources consultant and expert witness, were attached to the declaration of respondent's counsel. Pratt testified at his deposition on April 6, 2010 (prior to the settlement), that the practice of accruing unpaid salary was "entirely inconsistent with human resources management principles." In Pratt's opinion, the payment practices with respect to respondent "did not meet the standard of care applicable to the payment of employees among California employers using standard human resources management practices to facilitate Labor Code compliance." In his view, the practice of allowing part of an employee's salary to accrue was entirely improper and unprecedented, and Sonasoft had failed to implement proper practices concerning payment of respondent's compensation and documentation of that pay.

The declaration of respondent's counsel reiterated what had occurred at the hearing on April 19, 2010, when the parties had orally placed their settlement on the record. The record of that hearing, which was attached to his declaration, showed that Andy represented to the court that he had the authority of at least two of the three directors, including the chairman of the board of directors, to enter into each and every term of the settlement agreement. Andy indicated that he understood that a term of the settlement was that Sonasoft's board would make "a formal resolution fully reported on the minutes of the board meeting, indicating that Sonasoft agrees and is prepared to

implement each and every term" of the settlement agreement. Andy also agreed to forward a *copy* of the minutes of that resolution to his counsel so that his counsel could forward them to respondent's counsel.

According to respondent's counsel, Sonasoft sold stock approximately four times between January 2006 and May 2011, but Andy testified, during a May 26, 2011 debtor's examination, that Sonasoft did not have a copy of its stock ledger book. During that debtor's examination, Andy was asked about the failure to produce Sonasoft's stock ledger book for the period of January 1, 2006 to the date of the examination. Andy explained that Sonasoft did not have a copy of its stock ledger book because Sonasoft owed money to the stock transfer agent that kept the book. In his declaration, respondent's counsel acknowledged that, pursuant to court order, the stock ledger book had been produced for "attorney's eyes only" on about January 17, 2013.

According to the declaration of respondent's counsel, Sonasoft defaulted on the payments required under the settlement on or about July 6, 2010.[20]

Copies of Sonasoft's balance sheets attached to the declaration of respondent's counsel showed that, as of December 31 of the years 2006 to 2010 and as of May 25, 2011, Sonasoft had "other liabilities" in excess of $1 million. Respondent's counsel declared, without presentation of any further proof, that "[f]rom 2006 to the present, Sonasoft Corporation's Balance Sheets have shown approximately $1,000,000 in liability for 'accrued salary' that it has been unable to pay its employees."

Respondent's counsel claimed in his declaration that, to his knowledge, "Sonasoft has not been audited between 2006 and the present and Sonasoft has also failed to follow GAAP (generally accepted accounting principles)." Respondent provided no evidence supporting those statements and no legal authority to show that Sonasoft was required to follow GAAP.

[20] This date was five days (the grace period) after July 1, 2010, the date that the second payment was due under the settlement.

Respondent counsel stated in his supporting declaration that, in about August 2011 (after the money judgment had been entered against Sonasoft), Andy's son Mike visited respondent's counsel's law firm and offered a $5,000 check from Sonasoft in exchange for a reduction in the original judgment and "a significant limitation on attorney's fees." The check was refused.

The exhibits attached to the declaration of respondent's counsel included a declaration of Andy filed September 6, 2011. In it, Andy asserted that Sonasoft had experienced cash flow problems and incurred additional operating expenses since the settlement. The declaration filed in support of a motion to modify the court's order approving the settlement, also stated that, "[d]ue to circumstances unforeseen at the time of entering into the Settlement, Sonasoft was unable to meet the quarterly payment schedule on a continuing basis." Andy represented that a "modified schedule providing for smaller payments over a 15 month period beginning October 1, 2011[,] with final payment by December 31, 2011 [*sick*][,] [was] feasible."

Respondent's counsel further indicated in his declaration that, in about March 2012, third party creditors, who included Andy and his sons as employees of Sonasoft, unsuccessfully claimed priority with respect to monies deposited in a Sonasoft bank account upon which respondent had levied. Respondent's counsel further stated that Andy nevertheless continued to claim that Sonasoft could not pay respondent because of its debt to third party creditors.

Respondent's counsel stated in his declaration that Sonasoft's accountant "refused" to submit a declaration, as ordered by the court in November 2012, "verifying the accuracy and authenticity of the tax returns he prepared during the years 2011-2012." Evidence of that order and related proceedings were not attached as exhibits to his declaration. Respondent did not present evidence that Sonasoft tax returns had been prepared during those years or evidence linking the accountant's conduct to Andy.

In his declaration, respondent's counsel stated that respondent had repeatedly asked for Sonasoft's *original* board resolution ratifying the settlement but he had never received it. According to respondent's counsel, "the only reasonable inference" was that the stated date on the copy of the resolution, which had been produced, was false and the resolution was actually "prepared and executed recently." Respondent's counsel did not present affirmative evidence that respondent was entitled to the original resolution or that the copy had been falsified.

In opposition to the motion, Sonasoft filed declarations of several individuals, including Patrick Kelley, Sr. (Kelley), Jim Gilmer, and Andy. Kelley's declaration stated that he was formerly the secretary and a director of Sonasoft. He stated that he attended board meetings and shareholder meetings on numerous dates, specified in his declaration, during the period of January 2, 2003 through and including July 19, 2012. Kelley further stated that, in his capacity of secretary, he "took minutes of such meetings - whether they were shareholder meetings, board meetings, and/or meetings by unanimous written consent - and entered them into the corporate records for Sonasoft." Gilmer's declaration indicated that, when Kelley resigned from his position as secretary on July 19, 2012, Gilmer accepted the position. It indicated that since that time Gilmer had been recording the minutes of board meetings and entering them into records for Sonasoft.

The employment agreement entered into by Sonasoft and respondent was attached as an exhibit to Andy's declaration. The agreement provided that respondent would be employed as the "VP of Business Development" at a monthly salary of $10,000. The agreement further stated in part: "It is understood that the Company is not currently able to pay the full amount of such salary, therefore the amount not paid shall accrue (the 'Accrued Salary') to be paid on the terms and conditions set forth in the remainder of this agreement." It further provided: "The Company shall review its financial position from time to time in order to pay more, and accrue less, salary if able. Such decision will be at the sole discretion of the Board of Directors." Under the agreement, if Sonasoft

terminated respondent "for any reason other than cause" or if respondent resigned for "Good Reason," respondent was "entitled to all Accrued Salary that had not yet been paid." In certain circumstances, Sonasoft had the options of paying such accrued salary as a lump sum payment, through payroll over 12 months, or "in common stock of the Company at the then fair market value of such common stock." It also provided that "[i]f the Employee resigns, other than for Good Reason, no Accrued Salary or Severance Payment shall be paid."

4. *Analysis*

a. *Control of the Underlying Litigation*

In arguing below that Andy should be added as a judgment debtor under the alter ego theory, respondent relied heavily upon the claim that Andy controlled the underlying litigation. " 'The ability under section 187 to amend a judgment to add a defendant, thereby imposing liability on the new defendant without trial, requires *both* (1) that the new party be the alter ego of the old party *and* (2) that the new party had controlled the litigation, thereby having had the opportunity to litigate, in order to satisfy due process concerns.' (*Triplett v. Farmers Ins. Exchange* (1994) 24 Cal.App.4th 1415, 1421.)" (*Toho-Towa, supra*, 217 Cal.App.4th at p. 1106.) "[D]ue process requires a finding that the additional judgment debtor controlled the litigation in its capacity as alter ego, and was thus ' "virtually represented" ' in the lawsuit. (*NEC Electronics Inc. v. Hurt* (1989) 208 Cal.App.3d 772, 778.)" (*Baize v. Eastridge Companies LLC* (2006) 142 Cal.App.4th 293, 302.)

Andy does not dispute that that he managed or directed the litigation. Some degree of control is an ordinary and necessary incident of Andy's role as the CEO and a director of Sonasoft, which was not disputed. (See Corp. Code, § 312, subd. (a).) "Executive officers normally manage the day-to-day operations of the business of the corporation pursuant to provisions of the bylaws or delegation by the board." (1 Ballantine & Sterling, Cal. Corporation Laws (4th ed. 2011) § 88.03, p. 5-50 (rel.

104-10/2009), fn. omitted; see Corp. Code, § 300.) In support of the motion to add Andy as judgment debtor, appellants did not present evidence or legal authority showing that, in controlling the underlying litigation, Andy exceeded or misused his corporate authority.

b. *No Unity of Interest and Ownership*

Respondent now asserts, as he did below, that there was a sufficient unity of interest and ownership to disregard Sonasoft's corporate shell because (1) Sonasoft was undercapitalized, (2) Andy "used and treated Sonasoft as a sole proprietorship" "for his own personal gain and that of his sons.", and (3) Sonasoft failed to follow corporate formalities. A sole proprietorship "is a business in which one person owns all the assets, owes all the liabilities, and operates in his or her personal capacity, without forming any business entity." (1 Fletcher Cyc. Corp. (2015 Rev. ed.) § 23, pp. 53-54, fn. omitted; see Black's Law Dict. (10th ed. 2014) p. 1687.)

Throughout his appellate argument, respondent fails to properly cite to the record on appeal. (See Rule 8.204(a).) We scrutinize his arguments.

One "factor to be considered in determining whether individuals dealing through a corporation should be held personally responsible for the corporate obligations is whether there was an attempt to provide adequate capitalization for the corporation." (*Automotriz etc. De California v. Resnick, supra,* 47 Cal.2d at pp. 796-797.) " 'If a corporation is organized and carries on business without substantial capital in such a way that the corporation is likely to have no sufficient assets available to meet its debts, it is inequitable that shareholders should set up such a flimsy organization to escape personal liability. The attempt to do corporate business without providing any sufficient basis of financial responsibility to creditors is an abuse of the separate entity and will be ineffectual to exempt the shareholders from corporate debts. It is coming to be recognized as the policy of the law that shareholders should in good faith put at the risk of the business unincumbered capital reasonably adequate for its prospective liabilities.

If the capital is illusory or trifling compared with the business to be done and the risks of loss, this is a ground for denying the separate entity privilege.' " (*Id*. at p. 797.)

Ordinarily, the burden rests on the party seeking to pierce the corporate veil to establish what would constitute reasonable capitalization for a particular company. (See *Carlesimo v. Schwebel* (1948) 87 Cal.App.2d 482, 490; see also Evid. Code, § 500.) Respondent did not present any expert evidence on that issue.

But respondent presented evidence, in the form of Sonasoft's December 31 balance sheets for 2006 through 2010 and its May 25, 2011 balance sheet, showing that Sonasoft's total liabilities exceeded its total assets as of those dates. The evidence of those balance sheets and Sonasoft's salary accrual practices based on its financial situation suggested that Sonasoft was not adequately capitalized. Of course, respondent knew that Sonasoft did not have the financial wherewithal to pay his full wages since his employment agreement explicitly allowed unpaid salary to accrue due to the company's financial position.

"[C]ourts have cautioned against relying too heavily in isolation on the factors of inadequate capitalization or concentration of ownership and control. [Citations.]" (*Mid-Century Ins., supra,* 9 Cal.App.4th at p. 1213.) "Evidence of inadequate capitalization is, at best, merely a factor to be considered by the trial court in deciding whether or not to pierce the corporate veil." (*Associated Vendors, supra,* 210 Cal.App.2d at pp. 841-842.)

Another factor to be considered in determining whether an individual should be considered the alter ego of a corporation is extent of an individual's ownership of shares of corporate stock. "The doctrine of *alter ego* does not require that every share must be owned by the individual who seeks to mask his activities behind the fiction of a corporate identity. (*Meizlisch v. San Francisco Wool, etc., Co.* (1931) 213 Cal. 668; *Sunset Farms, Inc. v. Superior Court* (1935) 9 Cal.App.2d 389, 404.) The important fact is that the corporation is, in fact, controlled by the individual sought to be held and that recognition

of the separate existence of the controlled corporation would work a fraud or an injustice." (*O'Donnell v. Weintraub* (1968) 260 Cal.App.2d 352, 358.) While respondent's first amended complaint alleged that Andy owned shares of Sonasoft stock, in support of his motion to add Andy as a judgment debtor, respondent did not present evidence that Andy was a stockholder, much less that he was the sole stockholder, a majority stockholder, or part of a small group of controlling stockholders. (Cf. *Alexander*, *supra*, 104 Cal.App.3d at pp. 47-48 [sufficient evidence to apply alter ego theory because individual, who was sole shareholder and CEO of a corporation, caused all assets of the corporation to be sold in return for promissory notes payable to him rather than to the corporation, which left the corporation a "hollow shell"]; *Wenban Estate*, *supra*,193 Cal. at pp. 684, 688 [individual determined to be alter ego of corporation owned all of the capital stock; "[s]he controlled the corporation in all of its actions, and the officers of the corporation, who were members of her family, did whatever she wanted them to do with regard to the corporation"].)

"Normally, management and control [of a corporation] is vested in the board of directors, elected by the corporation's shareholders. The directors generally make policy and major decisions, but do not individually represent the corporation in dealings with third persons. Rather, corporate business is conducted through officers and employees, to whom authority is delegated by the directors. The same persons may be shareholders, directors and corporate officers (and usually are in small corporations)." (Ahart, Cal. Prac. Guide: Enforcing Judgments and Debts (The Rutter Group 2015) ¶ 3:47, p. 3-25.) No evidence was presented in support of respondent's motion indicating that the directors and executive officers other than Andy were mere figureheads who deferred to Andy's control of the corporation.

The provision of respondent's employment agreement establishing that the board would decide, in its "sole discretion," whether to "pay more, and accrue less, salary" upon review of Sonasoft's "financial position from time to time" may not have been

intended to bar the board from delegating that decision to Andy, as Sonasoft's CEO. Rather, its purpose may have been merely to clarify that the employee had no say-so in the matter. The deposition testimony of the chairman of the board suggested that the board was aware of Andy's practice of accruing unpaid salary and had no objection provided there was "mutual understanding" between Andy and the employee.

Respondent castigates Andy, as he did below, for "arbitrarily and unilaterally decid[ing] the value of Sonasoft's stock, based on factors as capricious as the color of his tie." But Andy's deposition testimony that was submitted in support of the motion indicated that Sonasoft's board, not Andy, determined the share value of corporate stock based on considerations such as Sonasoft's sales, the number of its customers, and its product offerings. Although Andy had facetiously added "the color of his tie" to the list of considerations, his deposition testimony did not establish that Andy treated Sonasoft as a sole proprietorship.

Respondent asserts that Sonasoft's board of directors did not approve its employee handbook. The relevance of that assertion is not apparent. No portion of the handbook was introduced into evidence in support of respondent's motion to add Andy as a judgment debtor. Appellants did not cite any legal authority establishing that an employee handbook must be approved or adopted by a corporation's board of directors.

Respondent relies on Andy's testimony explaining that Sonasoft had not produced the stock ledger because the stock transfer agent that had it was owed money. Respondent acknowledges that it was later produced. The evidence did not support an inference that Andy treated Sonasoft as a sole proprietorship.

There was no evidence that Andy treated Sonasoft's funds or other corporate assets as his own or diverted them to himself, that he commingled corporate funds with his personal funds, that he used the corporation to obtain labor, services, or merchandise for personal purposes, or that he engaged in business transactions in his own name. There was no evidence that Andy had deposited his personal funds into a Sonasoft

corporate account. Neither was there evidence that Andy held himself out as personally liable for corporate debt or personally guaranteed corporate debt.

The fact that, in about August 2011, Andy's son Mike proffered a $5,000 check to respondent's counsel as part of an attempt by Sonasoft to secure a postjudgment settlement with respondent does not demonstrate disregard for the corporate form. It appears from the copy of the check that it was written on a Sonasoft corporate account. There was no evidence that Mike Khanna was not an employee or an officer of Sonasoft or that he was not acting on the corporation's behalf.

In addition, respondent presented no evidence that Sonasoft failed to observe corporate formalities required by statute or its bylaws.[21] Respondent argues, as he did below, that the only reasonable inference from appellants' failure to produce the *original* minutes of Sonasoft's board resolution accepting the settlement is that the board did not observe corporate formalities and did not record minutes of its meetings. He also relies on the evidence that Sonasoft formerly operated with only three directors even though its bylaws provided for four directors. These arguments are without merit.

First, the settlement required Sonasoft to provide only *a copy* of the corporate minutes reflecting that the board had passed a resolution accepting the parties' settlement. In opposition to respondent's motion to add Andy as a judgment debtor, appellants filed declarations indicating that minutes of Sonasoft's board meetings had been prepared and entered into its corporate records. Respondent did not present countervailing evidence

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[21] Under the Corporations Code, "[t]he failure of a close corporation to observe corporate formalities relating to meetings of directors or shareholders in connection with the management of its affairs, pursuant to an agreement authorized by subdivision (b) [of Corporations Code section 300], shall not be considered a factor tending to establish that the shareholders have personal liability for corporate obligations." (Corp. Code, § 300, subd. (e).) The first amended complaint alleged that Sonasoft was a closely held corporation, but there was no evidence establishing that Sonasoft was a closely held corporation or that the shareholders had an agreement governing its affairs. (See Corp. Code, § 300, subd. (b).)

that Sonasoft had failed to hold meetings or maintain adequate minutes or other corporate records. Respondent did not present any evidence that appellants had any legal obligation to produce *original* corporate minutes.

Second, the evidence suggested that Sonasoft's board was to consist of four directors and, for a period of time, only three of the four seats had been filled. But respondent presented no evidence that Sonasoft's bylaws prohibited its board from having a vacant seat or precluded the board from acting with a vacant seat.

Since Sonasoft did finally produce a stock ledger, which Andy had earlier testified was in the possession of its transfer agent, Sonasoft's failure to produce it earlier was not evidence from which it could be inferred that Sonasoft had not maintained proper records of its stock sales. There was no evidence that Sonasoft entirely failed to file corporate tax returns.

The evidence was insufficient to show that there was such a unity of interest and ownership that the separate personalities of Sonasoft as a corporation and Andy as an individual did not exist. (*Mesler*, *supra*, 39 Cal.3d at p. 300.)

c. *No Inequitable Result*

Much of the evidence offered in support of respondent's motion to add Andy as a judgment debtor on an alter ego theory was obtained through depositions taken before the parties settled. Respondent's employment agreement predated his lawsuit and the settlement. Although respondent's first amended complaint asserted an alter ego theory of liability, respondent agreed to the settlement, which required respondent to "file a Dismissal With Prejudice against Andy Khanna, each party to bear its own attorney's fees and costs."

Respondent argues that failure to apply alter ego doctrine would "sanction a fraud or produce an unjust or inequitable result" and asserts that Andy "engaged in deceit." His lengthy argument contains absolutely no citations to the record to support his statements, and it is unclear whether he restricted his argument to evidence before the trial court on

his motion to add Andy as a judgment debtor. "Any statement in a brief concerning matters in the appellate record—whether factual or procedural and no matter where in the brief the reference to the record occurs—*must be supported by a citation to the record*." (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2015) ¶ 9:36, p. 9-12.) Statements unsupported by citations to the appellate record may be disregarded on appeal. (*Regents of University of California v. Sheily*, *supra*, 122 Cal.App.4th at p. 826, fn. 1.)

We asked the parties to submit supplemental briefing discussing whether the equities required, as a matter of law, that Andy not be added as a judgment debtor because respondent's first amended complaint contained alter ego allegations, the parties' judicially approved settlement provided for Andy to be dismissed with prejudice from the lawsuit (with each party to bear his own attorney fees and costs), and much of the evidence relied upon by respondent in moving to add Andy as a judgment debtor on an alter ego theory was obtained by respondent before the settlement. We directed the parties to focus on the record before the court in ruling on the motion.

Respondent now contends "the bulk of the evidence" supporting the alter ego theory came from "[e]xaminations under [o]ath taken of [Andy]."[22] With respect to undercapitalization, he directs us to Sonasoft's balance sheets. He also points to Andy's declaration, filed September 6, 2011, which indicated that Sonasoft was having cash flow problems and was seeking to modify the settlement.

Respondent further suggests that the difficulties he encountered in enforcing the judgment constituted further evidence of Sonasoft's undercapitalization. He also relies on his counsel's statement that, in about March 2012, the trial court denied the petition of

[22] In support of his motion to add Andy as a judgment debtor, respondent provided only one excerpt of Andy's testimony from a debtor's examination, and that testimony concerned the reason Sonasoft had failed, as of that point in time, to produce the company's stock ledger book.

third party creditors, which included Andy and his sons as employees. In addition, respondent points to his counsel's statement indicating that Sonasoft finally tendered a check in the amount of $85,526.29 on February 1, 2013, after the court issued a January 17, 2013 restraining order against Sonasoft, "prohibiting it from moving monies out of any of its existing bank accounts."

While he was still working for Sonasoft, respondent knew that the corporation had difficulties in meeting its financial obligations in light of his employment agreement. Sonasoft's failure to pay respondent's full salary after his employment ended on or about March 31, 2006 and before the parties' settled on April 19, 2011 was an additional indication that Sonasoft was undercapitalized. Even though his first amended complaint contained alter ego allegations, respondent nevertheless agreed to dismiss Andy with prejudice as part of the settlement.

While apparently Andy made an ad hoc decision regarding the portion of an employee's monthly salary that would be assigned to "accrued unpaid salary," and he was not guided by any compensation policy adopted by the board, respondent was fully aware of that evidence when he settled the lawsuit with both Sonasoft and Andy, agreeing to dismiss Andy with prejudice. In fact, the impropriety of the practice of accruing unpaid salary had been a critical aspect of the lawsuit.

Although in about March 2012 Andy and his sons apparently unsuccessfully asserted third-party claims of priority with respect to a Sonasoft bank account, the evidence presented in support of respondent's motion to add Andy as a judgment debtor did not establish that the claims were frivolous or asserted merely for purposes of obstructing or delaying enforcement of the judgment. Respondent's claim that "the third party claims are bogus" is not supported by citations to the appellate record or any legal authority.

Respondent now directs us to court orders purportedly showing that Sonasoft failed to follow corporate formalities. But those orders were not specifically raised in

support of respondent's motion to add Andy to the judgment as judgment debtor. Respondent suggests that many of the documents demonstrating Andy's control of Sonasoft were never obtained and "remain the subject of the OSC re: Contempt" against Andy. But respondent did not present evidence *in support of his motion* showing that Andy had been personally held in contempt or sanctioned by the court for conduct frustrating enforcement of the original or first amended judgment.

As indicated, "[i]t is an elementary rule of appellate procedure that, when reviewing the correctness of a trial court's judgment [or order], an appellate court will consider only matters which were part of the record at the time the judgment [or order] was entered. [Citation.]" (*Reserve Insurance*, *supra*, 30 Cal.3d at p. 813; see *Vons Companies*, *supra*, 14 Cal.4th at p. 444, fn. 3.)

Further, "it is not sufficient to merely show that a creditor will remain unsatisfied if the corporate veil is not pierced, and thus set up such an unhappy circumstance as proof of an 'inequitable result.' In almost every instance where a plaintiff has attempted to invoke the doctrine he is an unsatisfied creditor. The purpose of the doctrine is not to protect every unsatisfied creditor . . . ." (*Associated Vendors*, *supra*, 210 Cal.App.2d at p. 842; see *Mid-Century Ins.*, *supra*, 9 Cal.App.4th at p. 1213.) "The alter ego doctrine . . . affords protection where some conduct amounting to bad faith makes it inequitable for the corporate owner to hide behind the corporate form. Difficulty in enforcing a judgment or collecting a debt does not satisfy this standard. [Citations.]" (*Sonora Diamond*, *supra*, 83 Cal.App.4th at p. 539.)

The evidence adduced in support of the motion was not sufficient to show that disregard of Sonasoft's corporate form was necessary to do justice and reach an equitable result. Under the unique circumstances of this case, the trial court abused its discretion in granting respondent's motion to add Andy to the judgment as a judgment debtor.

DISPOSITION

The second amended judgment is modified by striking the language adding Andy Khanna as an additional judgment debtor. As modified, the second amended judgment is affirmed. The parties shall bear their own costs on appeal

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ELIA, J.

WE CONCUR:

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PREMO, Acting P.J.

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MIHARA, J.

Khanna v. Sonasoft Corporation et al.
H040007